86-681

Supreme Court, U.S.
FILED
SEP 22 1986
JOSEPH F. SPANIOL, JR
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

STATE OF TENNESSEE,)
Appellees)
Vs.)
HAROLD LEE LAWSON,)
Appellant)

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the State of Tennessee not deprive the Appellant of his rights without due process of law by failing to grant his motion for change of venue after its courts were presented with evidence of extensive pretrial publicity which infected the panel of jurors with highly inflamatory remarks from a judge and information highly probative of guilt which is inadmissable as evidence?

2. Did the State of Tennessee not deprive the Appellant of his rights without due process of law by permitting the in-court identification of the Appellant by witnesses who had been exposed to photographs of the Appellant under circumstances suggesting that he

was the murderer, who had never seen the murderer prior to the night of the crime, and who only were able to view the murderer under very poor lighting conditions?

3. Did the State of Tennessee not deprive the Appellant of his rights without due process of law by denying his motion for a pretrial lineup, given the inherent unreliability of the identification testimony as indicated above?

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TABLE OF AUTHORITIES

MAY IT PLEASE THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

This is an appeal from the denial of an application for permission to appeal by the Supreme Court of Tennessee which sought review of a decision of the Court of Criminal Appeals for the State of Tennessee affirming a verdict of a Rutherford County Circuit Court jury finding the defendant/appellant guilty of murder in the first degree and sentencing him to life imprisonment.

In this Petition, reference to the technical record shall be of the form (TR p. xx) where "xx" denotes the page of the technical record. References to the transcript of the evidence shall be of the form (TE v. xx, p. yy, l. zz) where "xx" refers to the volume, "yy" to

the page of the transcript of evidence, and "zz" refers to the line number. References to the transcript of preliminary proceedings on tne various motions filed in this cause shall be of the form (TP mm/dd/yy, v. xx, p. yy, l. zz) where "mm/dd/yy" denotes the date of the hearing, "xx" the volume number if applicable, "yy" the page number, and "zz" the line number. References to the Appendix of newspaper articles and radio and television broadcasts shall be in the form (A p. xx) where "xx" again denotes the page. The Defendant, Harold Lee Lawson, shall be referred to as the "Appellant" and the State of Tennessee as the "State."

REPORTS OF DECISIONS OF THE TENNESSEE COURTS

State v. Lawson, 11 TAM 28-22 (See Appendix)

JURISDICTIONAL GROUNDS

This Court has jurisdiction to determine the issues in this case by virtue of 28 U.S.C. §1257(3). The verdict of the jury finding the Appellant quilty of murder was rendered on the 12th day of January, 1984. A motion for new trial was timely filed under Tennessee law on the 9th day of February, 1984. Said motion was denied on the 27th day of December, 1984, and the Appellant filed a notice of appeal to the Tennessee Court of Criminal Appeals on the 16th day of January, 1985, which was timely under Tennessee law. The Court of Criminal Appeals affirmed the decision below on the 23rd day of May, 1986. An application for permission to appeal to the Supreme Court of the State of Tennessee was

timely filed under Tennessee law. Said application was denied by a per curiam opinion in an order filed on the 28th day of July, 1986. The issues presented in this Petition were raised at each level of the Tennessee appellate process.

CONSTITUTIONAL PROVISIONS

The Appellant relies upon the Due Process Clause of the Constitution of the United States of America as applied to the states by virtue of the 14th Amendment. The text of each are set forth below:

> Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for purlic use, without compensation.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Appellant was charged with the murder of his ex-wife. His attorney filed several motions on behalf of the accused. The three motions relevant for purposes of this petition are the Motion for Change of Venue filed April 26, 1983 (TR p. 32); Motion for a Line Up filed May 6, 1983 (TR p. 48); and Motion to Prohibit In-Court Identification of Defendant by Prosecution Witnesses filed the same day (TR p. 49). All of said motions were predicated in part upon the requirements of the due process clause of the Constitution of the United States.

In the motion for change of venue, the Appellant alleged that the extensive and sensational pretrial publicity throughout the Murfreesboro/Nashville area precluded a fair trial in Middle Tennessee in violation of due process of

law under the federal Constitution, and requested that venue be changed to a location in another grand division of the state, with Chattanooga, Tennessee specifically suggested. (TR pp. 32-34) In support of this motion, the Appellant filed his own affidavit indicating that he had received several threats based upon the extensive pretrial publicity. (TR p. 40).

In further support of that motion, the Appellant filed thirty (30) affidavits from members of the community who stated that they had read or heard the publicity concerning the case and were "convinced of the (Appellant's) guilt to the extent that (he) believes he should be sentenced and punished even without the benefit of a trial." (TR pp. 37, 38) See also (A. pp. 249-278)

Finally, the Appellant offered the affidavit of the secretary of the Appellant's counsel who stated that she received a telephone call from an unidentified female caller who expressed shock that any attorney would represent the Appellant. (TR p. 39).

At the hearing on the motion, and in supplementation to the affidavits previously filed, the Appellant presented the Court with newspaper articles, videotapes of television news broadcasts, and cassette tapes of the radio news broadcasts all reporting events surrounding the murder of Lucinda Lawson and the arrest of Harold Lawson.

Said news reports not only contained factual matters concerning the murder of Ms. Lawson and the arrest of

the Appellant, but also contained reports of which would normally be inadmissable evidence such matters as the Appellant's other criminal activity (see e.g., A. pp. 4, 6, 9, 35, 75, 101, 193), reports of family members who had later seen the Appellant and had chased him from the hospital in an effort to detain him (see, e.g., A. pp. 34, 35, 67, 188), statements of the family that they had received telephone calls from the Appellant prior to subsequent to the murder (see, e.g., A. pp. 6, 9, 10, 12, 20, 101), incidents of prior domestic difficulties between the Appellant and his ex-wife (see, e.g., A. pp. 4, 6, 14, 33, 67, 193), and the state of the general sessions judge that "helping accused murderer Harold Lawson escape from jail would be like 'setting a rattlesnake loose among innocent

people.'" (see Exhibit A to Motion to Supplement Record)

Numerous photographs were published of Harold Lawson immediately after the murder identifying him as the perpetrator. (See, e.g., A. pp. 9, 15, 81, 101). Articles appearing within days of the murder related the earlier threats made against Lucinda Lawson and her family during the course of their domestic difficulties and divorce. (See, e.g., A. pp. 4, 8, 29, 32, 101, 193.)

The Appellant filed the affidavits of representatives of the media indicating the extent of circulation in the relevant communities in the case of newspapers. (TR p. 65)

Finally, the Appellant offered the affidavit of Paul H. Keckley, President of Keckley Market Research, a business engaged in the business of surveying public opinion. (TR pp. 80-81) During the month of June, 1983, Mr. Keckley conducted an opinion poll was to measure public awareness of, and opinions concerning, the trial of the Appellant. Based upon a survey of 143 adult residents of Rutherford and Cannon County, Mr. Keckley found the following:

1. 78% of those adults surveyed had heard of the Lawson trial.

2. 58% of those adults who stated that they were aware of the case further stated that they had formed an opinion about the case.

3. 95% of those who were willing to state the opinion which they had formed believed that Lawson was guilty of murdering his ex-wife.

Based upon those findings, Mr. Keckley was of the opinion that the media coverage had created a predispostion to believe that the Appellant was guilty and that the prevailing climate of public opinion precluded a fair trial. (TR pp. 80-81)

To rebutt the evidence offered by the Appellant, the State subpoened jurors to testify at the hearing, nine of whom actually appeared. Of the nine prospective jurors testifying for the State, only one had not read or heard about the case. (TP 7-5-83, v. 1, pp. 67, 69, 71, 72-77, 78; v. 2, pp. 83, 85, 88, 92) Three of the jurors testified that they could not definitely state that they could set aside what they had read or heard and decide the case based solely upon the evidence presented at

trial. (TP 7-5-83, v. 1, pp. 69-70, 71; v. 2, p. 85) Of those three, two of the jurors stated that they had already formed an opinion with respect to guilt or innocence. (TP 7-5-83, v. 1, p. 71, l. 11; v. 2, p. 85, l. 22)

Although six of the nine prospective jurors did state that they could decide the case based only upon the evidence presented at trial and had formed no opinion of guilt or innocence, five of those six did give testimony suggesting that they had been prejudiced by publicity.

In an Order filed July 19, 1983, and addressing various motions filed on behalf of the Appellant, the Honorable J. S. Daniel denied the Motion for a Line-Up (TR p. 98). Although the court

did not specifically address the Appellant's Motion to Prohibit In-Court Identification of the Defendant by Prosecution Witnesses, both motions were considered simultaneously (TP 7-5-83, v. 1. p. 1 l 20), and the Court denied them both from the bench. (Tp 7-5-85, v. 1, p. 24, l. 21 - p. 25 l. 22). In the same Order, the Court found that the Motion for Change of Venue "may have some substance" but nevertheless denied the motion subject to the right of the Defendant to renew his motion following the voir dire of the jury at the time of the trial. (TR p. 98)

The Appellant's trial commenced on the 10th day of January, 1984. During the opening portion of the voir dire, the Court asked the entire panel of jurors if they had been exposed to the

and therefore, she had not been aware of the publicity. However, she was informed of the details of the case on the 10th day of January, 1983, by the other jurors who had reported for jury duty with her. (TE v.2, p.216, 1.6-25). Of the nine who later admitted to being exposed to pretrial publicity, four stated that the exposure to the publicity had influenced them toward a verdict of guilty or would make it difficult for them to be fair and impartial. (TE v.2, p.159, 1. 23 to p. 160, 1. 7; p. 227, 1.20 to p. 228, 1.7; p. 243, 1.13 to p. 244, 1.16; p. 246, 1. 11-21)

When the Appellant had exhausted all but one of his peremptory challenges, he accepted the jury. (TE v.2, p. 260, 1.16; p.263, 1.11-13) Of

the twelve jurors who were accepted for trial, five had testified that they had been exposed to the pretrial publicity or conversations about it. (TF v.1, pp. 103-104; v.2, pp. 174-177, 202-205, 216, 252) Juror Hollon had raised his hand to indicate that he would have a problem putting aside what he had read in the newspaper about the case. (TE v.1, p.103, 1.21-25). Juror Nix stated on voir dire that he had read about a lady being murdered in the hospital. (TE v.2, p. 177 1.21 to p. 178 1.1) Juror Freedman indicated that he had read that the Appellant had gone into the hospital room and killed his wife. (TE v.2, p.204, 1.19-21) Juror Snuggs statements that the other jurors explained the details of what happened to her have already been detailed. (TE v.2, p. 216, 1.19-25) Juror Brewington stated that he

had been exposed to the facts of the case through newspaper articles and radio and television newscasts. (TF v.2, p. 251, l.25 to p. 252, l. 3)

At the conclusion of the voir dire, the Appellant renewed his motion for change of venue on the grounds that the jury selected was tainted by the extensive pretrial publicity in the community. (TE v.2, p. 295, l. 1) Said motion was denied. (TE v. 2, pp. 296-297)

Following voir dire, the state opened its case. As part of its case, the state offered various identification witnesses.

According to the testimony of Raymond Lowe, a security guard a Middle

Tennessee Medical Center, a male approached the front desk of the hospital, at approximately 3:50 A.M. on November 3, 1981. (TE v.3, p.107) The lights in the lobby had been dimmed for the evening. (TE v.3, pp.126-127) The security guard, who never rose, testified that he had never seen the man before and spoke with him at the desk for only a minute. (TE v.3, pp.127-128) The man requested the room number of a Ms. Maxwell and stated that he had come to see his wife who was sitting with her grandmother. (TE v.3, pp.107-108) The security guard gave the man instructions on how to get to the room and the man left. (TE v.3, pp.109-110). The security guard described the man as being approximately 6' 1" or 6' 2" tall, weighing 175-180 pounds, with black hair and a full beard. He had on a plaid

shirt with blue jeans. (TE v.3, p.111) The security guard identified the man who he had seen that night as the Appellant over the objection that the identification violated the requirements of due process clause of the United States Constitution. (TE v.3, p.111)

On cross examination, the witness admitted that he had been shown a single newspaper article with a photograph of Harold Lee Lawson and asked if the man in the photograph was the man who had come to the hospital that evening. The photograph had been published in the March 10, 1982 edition of the Nashville Tennessean. The caption contained the name of Harold Lee Lawson. (TE v.3, pp.132-138) Upon further questioning, the witness admitted that he knew that the defendant would be sitting at the

defense table in the courtroom when he was asked to identify the murderer in court. (TE v.3, p.141) He further testified that he had seen several photographs of a man without a beard bearing the caption of Harold Lee Lawson in the local newspapers and that the Appellant did not have a beard at the time of the in-court identification. (TE v.3, p.139)

According to the testimony of the three nurses on the floor where Lucinda Lawson and her grandmother were staying, each of the nurses heard a scream come from Room 321 around 4 A.M. on November 3, 1981. Each of the nurses responded. Upon arriving there, they saw a man struggling in the room with a woman. The woman exclaimed that the man was going to kill her. The nurses left the room to

summon assistance. When they returned, the woman was lying on the floor of the room and man was fleeing down the hall. (TE v.4, pp.148-153; pp.160-170; pp.200-208) Each testified that they saw the man only breifly under very adverse lighting conditions. Each such witness testified that the man they saw had a beard.

Beverly Avery, the third nurse, corroborated the testimony of the other two nurses. (TE v.4, pp.200-254) However, she also testified that while she was in the room, the assailant looked back over his shoulder. (TE v.4, p. 206) When she returned from summoning assistance, she saw the assailant running down the hall. He glanced back, and she was able to see his face again. She identified the person whom she saw

that night as the Appellant over objection. (TE v.4, p.208). On cross examination, Ms. Avery admitted that only the night lights were on in room 321 and that all she was able to see of Ms. Lawson's assailant was the side of his head. (TE v.4, pp.223-224) She also admitted that she only had the opportunity to see the assailant in the hall for no more than two seconds. (TE v.4, p.237) The witness testified that she had never seen the assailant before November 3rd. (TE v.4, p.253) The witness also conceded that the day after the murder, she had seen the newspaper articles and photographs identifying the Appellant as the assailant and continued to see such photographs in the local media. (TE v.4, pp 244-246; 254) Finally, Ms. Avery indicated that she knew that the Appellant would be sitting

at the defense table when she was asked to identify the assailant in the courtroom. (TE v.4, p.250)

The State also offered the testimony of a respiratory therapist, Roger Richardson, and a respiratory technician, James Young, who met a man fleeing the hospital in a stairwell as they responded to the emergency call. (TE v.4, pp.255-280; v.4, p.285 to v.5 p.308) Mr. Richardson testified that when he entered the stairwell, he ran into the chest of a very large man who grabbed him and pushed him down. Mr. Richardson indicated that every other light in the corridor had been cut off for the night. (TE v.4, p.261) Richardson estimated that he had between 15-45 seconds to view the man in the stairway. (TE v.4, p.262) He then

identified the man in the stairway as the Appellant over objection. (TE v.4, p.262). On cross examination, Richardson admitted that he had earlier told the police that the man in the stairwell had a white bushy beard. (TE v.4, p. 274) He conceded that he had seen the photograph in the Daily News Journal the day after the murder as well as other photographs and television broadcasts appearing later. (TE v.4, pp.279-280)

The testimony of Mr. Young was very similar to that of Mr. Richardson. (TE v.4, p.285 to v.5, p.307) Over objection, he also identified the man in the stairwell as the Appellant based upon his eyes and bone structure. (TE v.4, pp.288:289). On cross examination, Mr. Young stated that he recalled the

handle of the knife was white. (TE v.5, p.297) He also admitted that the stairway was dimly lighted. (TE v.5, p.302) He also conceded that he saw the photographs appearing in the newspapers right after the time of the murder. (TE v.5, p.303)

Mabel Crumley, the Appellant's mother's beautician in Greene County, Tennessee, testified that she had seen the Appellant in her beauty shop for fifteen to twenty minutes on Saturday, October 31, when he came to pick up his mother. On that occasion, the Appellant did not have a beard. (TE v.5, pp.395-399) On cross examination, she stated that it would normally take a man four to six weeks to grow a thick beard. (TE v.5, p.407)

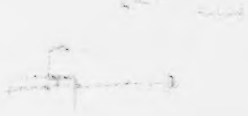
Johnny Bernard, a resident of the Long Island Community on the outskirts of Kingsport, Tennessee, testified that he had seen the Appellant on the Monday evening before the date of Lucinda Lawson's murder. They had watched Monday night football together in Kingsport until 11:00 P.M. to midnight. The Appellant was clean shaven on that evening. (TE v.5, pp.408-414)

Beverly Chandler, an employee at Lakeshore Mental Health Center in Knoxville, Tennessee, responded to a subpoena duces tecum and appeared to testify with a photograph of the Appellant taken in May of 1981. Said photograph was filed as Exhibit 14. (TE v.5, pp.425-430). No beard can be seen in that exhibit.

Dale Jones, an employee of Lawson Packing Company in Morristown, Tennessee, testified that he worked with the Appellant on the Monday in November before the murder. On that date, the Appellant was clean shaven. (TE v.6, pp.431-440)

Debra Lawson, the Appellant's sister-in-law, testified that she saw the Appellant on November 2, 1981 at his mother's birthday supper which she had prepared. The Appellant was clean shaven on that date. (TE v.6, pp.442-446)

On January 12, 1984, the jury returned a verdict convicting the Defendant of murder in the first degree and imposing a life sentence. (TR p. 270-271) At the commencement of the trial, the State had withdrawn its



request for the imposition of the death sentence. (TE v. III, p. 6, l. 25) On the 9th day of February, 1984, the court appointed attorneys filed a Motion for New Trial consisting of eighteen (18) assignments of error including the issues contained in this petition. (TR p. 278-280)

The Motion for New Trial was argued on the 17th day of December, 1984. Said motion was denied by order filed on the 27th day of December, 1984. Notice of Appeal to the Tennessee Court of Criminal Appeals was filed by said appointed counsel on the 16th day of January, 1985. (TR p. 360)

The Court of Criminal Appeals for the State of Tennessee affirmed the decision below in an opinion filed the

23rd day of May, 1986. An application for permission to appeal to Tennessee Supreme Court was filed pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. The Application for Permission to Appeal was denied by the Tennessee Supreme Court on the 25th day of July, 1986. This case is properly before this Honorable Supreme Court of the United States.

REASONS FOR ALLOWING THE WRIT OF CERTIORARI TO ISSUE

The Tennessee appellate courts have decided the question of whether the Appellant was entitled to a change of venue as a matter of due process in a manner in conflict with the opinion of this Honorable Court in **Rideau v. State**

of Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963) and Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). By virtue of the holdings of this Court in these two cases, the Appellant was Constitutionally entitled to a change of venue by virtue of the extensive pretrial publicity which permeated both the community and the venire.

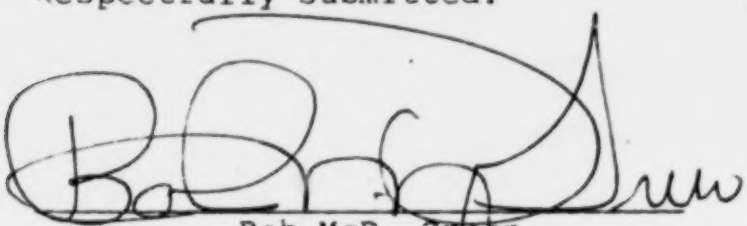
The Tennessee appellate courts have decided the questions of whether the Appellant was entitled to a pretrial lineup as a matter of due process of law and whether the state should be permitted to conduct an in-court identification as a matter of due process, both of which are important questions of federal Constitutional law which have not been, but should be,

settled by this Honorable Court, or if settled, were decided by the Tennessee Courts in conflict with the decisions of this Court. The Appellant respectfully submits that the due process clause requires the State to afford a criminal defendant a pre-trial lineup or to forego in-court identification where (1) each identification witness viewed the crime only briefly and under adverse lighting conditions, (2) each identification witness described the perpetrator of the crime in a way significantly different from the other, and (3) each of the identification witnesses were exposed to extensive pre-trial publicity identifying the defendant as the perpetrator.

CONCLUSION

Based upon the foregoing, the Appellant respectfully submits that this Honorable Court should grant his petition for Writ of Certiorari.

Respectfully submitted:



Bob McD. Green

Rogers, Laughlin, Nunnally & Hood

By: _____

And: _____

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A P P E N D I X

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
Appellee,	)	
	)	
V. C.C.A. No. 85-25-II	)	RUTHERFORD
	)	CRIMINAL
HAROLD LEE LAWSON,	)	
Appellant.	)	

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS OF

TENNESSEE

NASHVILLE, APRIL SESSION, 1986

STATE OF TENNESSEE,	)
Appellee	)C.C.A. No. 85-25-II
	)Rutherford County
v.	)Honorable J.S.
	) Daniel, Judge
HAROLD LEE LAWSON,	)(Murder in the
Appellant	) First Degree)

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OPINION FILED: May 23, 1986

AFFIRMED

Joe D. Duncan, Judge

O P I N I O N

The defendant, Harold Lee Lawson, was convicted of murder in the first degree and was sentenced to imprisonment for life.

We find no pejudicial error regarding any of the numerous issues raised in this appeal. Therefore, the judgment is affirmed.

The State's evidence showed that in early morning hours of November 3, 1981, the victim, Lucinda Maxwell Lawson, was fatally stabbed as she sat with her sick grandmother at the Rutherford County Hospital. After the victim was stabbed, her assailant fled from the hospital.

Raymond Lowe, a security guard at the hospital, related that the defendant came to the front desk of the hospital and asked for the room of Mrs. Mattie Maxwell, the victim's grandmother. The defendant said he wanted to go up and see his wife who was sitting with her grandmother.

Beverly Avery, a nurse at the hospital, saw the victim and the defendant struggling as she entered the room. The victim screamed, "He's going to stab me." Mrs. Avery ran to get help. She saw the defendant run down the hallway.

Roger Richardson and James Young, hospital employees, saw the defendant near the base of the hospital stairwell. The defendant had a knife in his hand.

All of the above witnesses identified the defendant as being the person they saw in the hospital on this occasion.

After the victim was killed, the defendant was not apprehended until 1983, at which time he was apprehended by Arnold Jobe, a resident of Texarkana, Arkansas. Jobe knew the defendant by the name of Roy Green. Jobe learned that the defendant was wanted in Tennessee for the murder of his ex-wife. Jobe saw the defendant parked in a car behind Jobe's convenience store. Jobe pulled a gun and ordered the defendant to stop. The defendant offered Jobe the car and everything in it if Jobe would let him go.

Thomas J. Carmouche, a T.B.I. agent, went to Arkansas in April, 1983, to pick up the defendant. The defendant told Carmouche that he feared he would be killed if he returned to Tennessee.

Other evidence showed that the defendant and the victim were married in 1976. In March, 1981, the victim was granted a divorce from the defendant, and she received custody of the couple's two (2) children. In January, 1981, Billie Sue Maxwell, the victim's mother went with the victim to Kingsport, Tennessee, in an effort to find the defendant, who had taken the couple's children. Ms. Maxwell talked to the defendant on the phone, and during their conversation, the defendant threatened to kill Ms. Maxwell and the victim. The defendant had previously threatened the

lives of all the Maxwell family if they tried to take the children away from him. He had stated to Ms. Maxwell: "I'll kill Cindy before I'll see her take my children away from me. And that goes for you, too, and W.L., and any other sorry son-of-a-bitch that tries to take them away from me."

In December 1980, the defendant told Christine Huddleston to give the victim a message, saying: "You tell her I love her, but I'll kill her deader than hell if she gives me any problems." Ms. Huddleston spoke to the defendant on two (2) other occasions and each time he threatened to kill the victim.

On another occasion Don Gandy, a private investigator, travelled with the victim to Wilson County in a successful

lives of all the Maxwell family if they tried to take the children away from him. He had stated to Ms. Maxwell: "I'll kill Cindy before I'll see her take my children away from me. And that goes for you, too, and W.L., and any other sorry son-of-a-bitch that tries to take them away from me."

In December 1980, the defendant told Christine Huddleston to give the victim a message, saying: "You tell her I love her, but I'll kill her deader than hell if she gives me any problems." Ms. Huddleston spoke to the defendant on two (2) other occasions and each time he threatened to kill the victim.

On another occasion Don Gandy, a private investigator, travelled with the victim to Wilson County in a successful

effort to locate the defendant and have him arrested for taking one of the couple's children. On this occasion, Gandy heard the defendant tell the victim he would kill her for having him arrested.

We need not further review the evidence. Unquestionably, the State's evidence was more than sufficient to warrant the jury's verdict finding the defendant guilty beyond a reasonable doubt of murder in the first degree. Any rational trier of the fact would have so found. T.R.A.P. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Alleging undue and prejudicial pretrial publicity, the defendant contends that the trial court erred in

denying his motion for a change of venue.

In criminal prosecutions, the venue may be changed if due to undue excitement against the defendant, a fair trial probably cannot be had. Tenn. R. Crim. P. 21(). The matter of a change of venue addresses itself to the sound discretion of the trial judge and his decision will not be disturbed unless it is shown that there was "an affirmative and clear abuse of that discretion." Rippy v. State, 550 S.W.2d 636, 638 (Tenn. 1977). The ultimate test is whether the jurors who actually sat and rendered a verdict in the case were prejudiced by the pretrial publicity. State v. Garland, 617 S.W.2d 176, 187 (Tenn. Cr. App. 1981). In Irvin v.

Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Court wrote:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, wide-spread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceieved notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient that the juror can lay aside his impression or opinion and to render a verdict based on the evidence presented in court.

81 S.Ct. at 1642-43.

In support of his motion for a change of venue, the defendant filed his

own affidavit, indicating among other things, that he had received threats due to the extensive pretiral publicity. The defendant also filed 30 affidavits from members of the community who stated that they had read or heard the publicity concerning the case and that they were convinced of the defendant's guilt. An affidavit from the defendant's counsel's secretary indicated that an unidentified female had called and had expressed shock that any attorney would represent the defendant. The defendant also filed a large volume of newspaper articles, and transcripts of television and radio broadcasts about the events surrounding the murder of the victim, the ensuing developments, and the ultimate arrest of the defendant.

Also, the affidavit of Paul H. Keckley, a pollster, was introduced. In this affidavit, he asserted that 78 percent of the adults surveyed in Rutherford and Cannon Counties had heard about the case; 58 percent of those people had formed an opinion, with 95 percent of those believing the defendant was guilty. Thus, based on his survey, Mr. Keckley stated in substance that prevailing community sentiment was such that defendant could not receive a fair trial in Rutherford or Cannon Counties.

Regarding the Keckley poll, the record is absent sufficient information by which we can evaluate the scientific reliability of the statistics contained therein. We do not know the names, ages, or occupations of the people interviewed, or whether they were a

representative group of the total population. We do not know the margin of error in the poll. Further, those who indicated an opinion about the case were not asked if they could set aside their opinion. Also, we do not know the exact questions that were asked. Further, the voir dire of the jury, which we will comment on later in this opinion, reveals an entireley different community sentiment than is indicated by the Keckley poll.

At any rate, at the hearing on the motion for change of venue, the State, in an effort to counter the defendant's affidavits, called nine members of the jury panels that were serving for that term of the court. We note that none of these jurors were on the jury venire from which the defendant's jury was

chosen several months later. When questioned, eight of these jurors indicated that they had either read or heard about the case. Out of these, two stated they had formed an opinion with respect to guilt or innocence. Six of the nine stated that they could decide the case on the evidence and had formed no opinion as to the defendant's guilt or innocence.

One of the defendant's claims is that it was error for the trial court to allow the State to present oral testimony from its witnesses on the venue issue. We find no merit to this claim. Rule 21(b) of the Rules of Criminal Procedure allows the State to file counter-affidavits. However, the rules does not mandate the submission of affidavits by the State. A trial court,

in its discretion, may hear testimony from witnesses regarding the propriety of a change of venue. Holcomb v. State, 78 Tenn. 417 (1882); Porter v. State, 71 Tenn. 496 (1879).

In any event, based on the evidence that was before the trial court at that hearing, the court denied the motion, but stated that the defendant could renew his motion following the voir dire of the jury at the trial.

In State v. Hoover, 594 S.W.2d 743, 746, (Tenn. Cr. App. 1979), the Court listed seventeen relevent factors to be considered in determining whether a change of venue should be granted. Included in these factors are the developments that occur during the selection of the jury to try the case.

It is clear from the trial record that there was not unusual difficulty in obtaining a jury for the trial of a case of this type. Only one day was required to select the jury. Around 200 prospective jurors were present. The trial court, after preliminarily examining these citizens, excused seven for physical ailments and six for hardship reasons. Out of this group, the trial court also excused fifteen who indicated they had fixed opinions about the case. Out of the approximately 172 prospective jurors remaining, twenty-five were actually questioned by counsel in the process of obtaining the twelve jurors to sit on the case. The defendant peremptorily challenged seven out of the thirteen that were excused.

The defendant had one unused peremptory challenge.

Further, five members of the venire were examined as prospective alternates. Two were selected and three were excused.

Additionally, the record reveals that the defendant did not challenge for cause any of the jurors who were seated to try the case.

Also, our review of the records shows that of the twelve jurors who actually decided the case, only five indicated that they had any knowledge about the case. They had limited knowledge from having read or heard about the case. None knew any of the facts of the case and none had any fixed

opinions about the defendant's guilt or innocence. All of the jurors indicated they could and would decide the case on the evidence.

The record makes it abundantly clear that the trial judge saw to it that a fair and impartial jury was chosen to try the defendant's case.

Other Hoover factors relate to the nature, content, extent and timing of the publicity surrounding the case. In the present case, the major part of the publicity about the case was generated during 1981, with some publicity occuring in 1983. The offense occurred in November, 1981. The venue change motion was heard in July, 1983, and the trial was held in January, 1984. The publicity involved in this case

consisted primarily of factual matters concerning the events concerning the killing and the developments thereafter, including the ultimate apprehension of the defendant. We see nothing that was overly sensational or inflamatory in the publicity. Also, as we have indicated, none of the jurors that tried the case had been subjected to extensive publicity about the case.

Suffice it to say that after considering all of the factors mentioned in Hoover in the light of the evidence in this record, we conclude that the trial court correctly denied the defendant's motion for a change of venue. The record affirmatively demonstrates that the defendant received a fair trial by a fair and impratial jury.

Next, the defendant says the trial court should have suppressed the identification testimony of the State's witnesses, and that his motion for a pretrial lineup was improperly denied.

No pretrial lineup was held by the police. Four of the State's witnesses identified the defendant at the trial. Apparently, the defendant is arguing that the identification testimony was tainted because they had seen a photograph of the defendant in newspapers or that had otherwise been exhibited to one or more of them by other non-police sources.

Since no State action was involved in the witnesses' identification of the defendant, the evidence was properly

admitted. The safeguard of the exlusionary rule in such matters does not apply to the activities of private citizens. Bishop v. State, 582 S.W.2ld 86 (Tenn. Cr. App. 1979); Ennis v. State, 549 S.W.2d 380 (Tenn. Cr. App. 1976).

Each of the identifying witnesses had a good opportunity to view the defendant on the night of the crime, and their identification of the deendant was based upon their observation of him at the time of the offense. We see nothing in the record to show that the witnesses' identification was tainted.

Admittedly, by virtue of the trial setting, a defendant is suggested to some extent to identifying witnesses as being the perpetrator of the crime, but

the safeguard to the defendant is his right to cross-examine the identifying witnesses and thereby probe for weaknesses in their identification. United States v. Hamilton, 469 F.2d 880 (9th Cir. 1972); United States ex rel. Stewart v. Readman, 470 F.Supp. 50 (D.C. Del. 1979).

The identification testimony was properly admitted, and it was the jury's function to weigh the identifying witnesses' testimony in light of the matters adduced in their direct testimony as well as that developed on cross-examination.

Also, there is no merit to the defendant's issue that the trial court should have ordered a pretrial lineup. There is no right to a pretrial lineup.

Daugherty v. State 478 S.Ws.2d 921, 922 (Tenn. Cr. App. 1972); United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973).

Another issue by the defendant concerns his special requests for instructions on the law pertaining to identification.

Regarding one of the defendant's special requests, the trial court refused to give an instruction, often referred to as the "Telefaire charge." We have held that this type of charge is not required. State v. Lewis, 628 S.W.2d 750 (Tenn. Cr. App. 1981); Holt v. State, 591 S.W.2d 785 (Tenn. Cr. App. 1979).

Further, another requested instruction was given, but the trial

court omitted the words "such as lighting."

The defendant contends that the trial judge was obligated to inform his counsel prior to closing arguments of the denial of his first requested instruction and that some of the words in the second requested instruction would be omitted.

The record shows that the defendant did not request to be informed as to the trial court's proposed action on his requests. Since the defendant did not object to proceeding before compliance by the trial court with Tenn. R. Crim. P. 30(a), any defect in the proceeding was waived. T.R.A.P. 36(a); State v. Pritchett, 621 S.W.2d 127, 135 (Tenn. 1981).

Additionally, the record shows that the trial court gave an adequate charge on the applicable law regarding identification. When this is done, refusal of a special request for instruction on the same subject is not error. State v. Lewis, supra.

Next, the trial court did not err in allowing evidence of the defendant's previous threats against the victim. These threats were relevant to prove intent, motive, and premeditation. Goaler v. State, 64 Tenn. 678, 680 (1875); Hull v. State, 553 S.W.2d 90, 92-93 (Tenn. Cr. App. 1977).

Another issue concerns the testimony of defense witness Dale Jones. Jones testified that he worked at the

Lawson Meat Packing Company, and that the defendant worked with him on the day before the murder and was clean-shaven. The State's witnesses had indicated that on the night of the murder, the defendant had a beard.

The prosecuting attorney asked Jones whether anyone from the Lawson Meat Packing Company planned to appear and present payroll records to establish the times the defendant worked.

The defendant contends that this was an impermissible comment on a missing witness, arguing that no proper foundation was laid to establish that the owner of the company was a missing witness.

It was established that the defendant was related to the owner of Lawson Meat Packing Company. The owner of that company would have knowledge of material facts relevant to one or more of the facts in issue in the case, and due to the relationship, the owner would be inclined to testify in favor of the defendant. Under these circumstances, a proper foundation was laid, and the question was proper. Delk v. State, 590 S.Ws.2d 435, 440 (Ten. 1979).

Also the defendant says it was error for the trial court to allow State's witness, Don Gandy, to testify about a threat made by the defendant to kill the victim.

Gandy testified that he was a private investigator employed by the

victim to locate her children who had been taken away by the defendant. Gandy was present at the Wilson County Jail when the defendant told his ex-wife, "Cindy, I'm going to kill you for doing this to me."

The defendant contends this evidence was inadmissible because he had not been advised of his Miranda rights.

Since the defendant's statement was not elicited by any police interrogation, the Miranda protections did not apply. Gandy's evidence was properly admitted.

Finally, the defendant says the State made improper comments on his failure to testify.

In his opening statement, the prosecuting attorney said:

> And, if you will indulge me for a moment, I am going to speculate for a moment what I believe the defense might present in this case. I will tell you that, under the law, I don't believe that we will hear from any alibi witnesses; "alibi" meaning that I was not there. I don't believe that we will hear any alibi witnesses.
>
> I believe that the defendant's defense is going to be simply misidentification. "I wasn't the person; I am not the person that was there; or if I was there it wasn't me."

During closing argument, the prosecuting attorney made the following statement:

> Evaluate her testimony the same as you did the defendant's. See who has something to gain and who has something to lose.

The defendant made no objection to the remarks contained in the prosecuting attorney's opening statement until after

the opening statement, at which time he moved for a mistrial. Also, no objection was made during the closing argument. Thus, by failing to make contemporaneous objections to both of the remarks complained of, the defendant has waived these complaints. T.R.A.P. 36(a); State v. Compton, 642 S.W.2d 745, 747 (Tenn. Cr. App. 1982).

At any rate, any prejudicial effect from the prosecuting attorney's comments were dissipated by the trial court when it charged that the defendant was not required to testify and that his failure to do so could not be considered for any purpose against him. See Craig v. State, 524 S.W.2d 504, 508 (Tenn. Cr. App. 1974).

Further, in view of the overwhelming evidence showing the defendant's built, any error here is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Fears, 659 S.W.2d 370, 378 (Tenn. Cr. App. 1983).

We find no reversible error. The judgment is affirmed.

S/Joe W. Duncan, Judge

CONCUR:

S/F. Lloyd Tatum, Judge

S/Allen R. Cornelius, Jr., Judge

KCH/pmb/43b/6

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Brief has been served upon the State of Tennessee by placing three true and exact copies of said Brief in the United States Mail addressed to W. J. Michael Cody, Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, with sufficient postage thereon to carry the same to its destination.

This the 19th day of September, 1986.

ROGERS, LAUGHLIN, NUNNALLY, & HOOD

BY: Kenneth Clark Hood

A F F I D A V I T

STATE OF TENNESSEE X

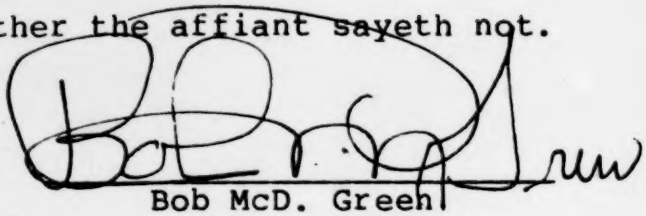
COUNTY OF Washington X

I, Bob McD. Green, after being duly sworn in accordance with law, do hereby depose and state as follows:

1. I am an attorney duly licensed to practice law in the State of Tennessee, and I am a member of the Bar of the Supreme Court of the United States of America.

2. The attached Petition for Writ of Certiorari was mailed to the Clerk of the Supreme Court of the United States of America on Friday, September 19, 1986, within the time permitted by the rules of that Court.

And further the affiant sayeth not.



Bob McD. Green

Sworn to and subscribed before me on this the 18th day of September, 1986.

Notary Public

My Commission Expires:

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